Resort Nursing Home and Kingsbridge Heights Rehabilitation Care Center *and* New York's Health & Human Services Union, 1199, SEIU, AFL–CIO. Case 29–CA–24886

September 30, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

On May 15, 2003, Administrative Law Judge Raymond P. Green issued the attached decision. The Respondents filed exceptions and a supporting brief, the General Counsel and Charging Party filed answering briefs, and the Charging Party filed exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified.[1]

AMENDED REMEDY

Substitute the following for the third paragraph in the remedy section of the judge's decision.

To the extent that the Respondents have failed to comply with the terms of the above-described contract, they shall be ordered to make whole their employees for any loss of earnings and other benefits they may have suffered as a result of that failure. Also, to the extent that the Respondents have failed to make payments to any benefit funds in the amounts required by the above-described contract, they shall be ordered to make such funds whole in accordance with the terms of that contract, including paying any additional amounts applicable to such delinquent payments in accordance with *Merryweather Optical Co*., 240 NLRB 1213, 1216 (1979). In addition, the Respondent shall reimburse unit employees for any expenses ensuing from its failure, if any, to make such required payments or contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981). All payments to unit employees shall be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondents, Resort Nursing Home, Far Rockaway, New York, and Kingsbridge Heights Rehabilitation Care Center, Bronx, New York, their officers, agents, successors, and assigns, shall take the action set forth in the Order as modified below.

1. Substitute the following for paragraph 2(f).

"(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply."

2. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. September 30, 2003

Robert J. Battista,	Chairman
Wilma B. Liebman,	Member
Dennis P. Walsh,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

[1] We shall amend the judge's remedy, modify the recommended Order, and substitute a new notice to conform to the Board's standard remedial language.

Chairman Battista agrees with the judge's finding that under *Chel LaCort*, 315 NLRB 1036 (1994), the Respondents' untimely withdrawal from the multiemployer bargaining unit was not justified by "unusual circumstances." The Chairman did not participate in *Chel LaCort*. Regardless of his views concerning that decision, he notes that there are not three votes to overrule it. Under these circumstances, the Chairman finds it unnecessary to express an opinion on whether *Chel LaCort* was correctly decided.

[2] To the extent that an employee has made personal contributions to a fund that are accepted by the fund in lieu of the employer's delinquent contributions during the period of the delinquency, the Respondent will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that the Respondent otherwise owes the fund.

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain collectively with New York's Health & Human Services Union, 1199, SEIU, AFL–CIO by refusing to execute the collective-bargaining agreement that was agreed to between the Union and Greater New York Health Care Facilities Association on February 1, 2002.

WE WILL NOT refuse to abide by the terms and conditions of the agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on the Union's request, execute the agreement.

WE WILL make our employees whole, with interest, for any losses suffered by reason of our failure to abide by the terms of the agreement.

WE WILL make whole the Union's benefit funds for any losses suffered by reason of our failure to abide by the terms of the agreement.

RESORT NURSING HOME AND KINGSBRIDGE HEIGHTS REHABILITATION CARE CENTER

Richard A. Bock, Esq., for the General Counsel.
Joel Cohen, Esq., for the Respondent.
Daniel J. Ratner, Esq. and *Carl J. Levine, Esq.,* for the Union.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. I heard this case on February 13 and March 10 and 12, 2003, in Brooklyn, New York. The charge was filed on April 24, 2002, and the complaint was issued on July 16, 2002. In substance, the complaint alleges that (a) the Respondents have been members of the Greater New York Healthcare Facilities Association Inc., and that (b) on or about February 11, 2002, the Respondent refused to be bound or adhere to a collective-bargaining agreement that had been negotiated between the Association and the Union on February 1, 2002.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following[1]

FINDINGS AND CONCLUSIONS

I. JURISDICTION

It is admitted that the Employers are engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. It also is admitted that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICE

Greater New York Healthcare Facilities Association Inc. has had a series of collective-bargaining agreements with Local 144. That Union was merged into 1199 and the contracts, which were in effect from October 1, 1997, to September 23, 2002, were between the Association and 144 Division of 1199. During that period, although negotiated together, there were three contract documents with many overlapping provisions, covering registered nurses, licensed practical nurses, and para-professionals.[2]

The Respondents, Resort Nursing Home and Kingsbridge Heights, although separate corporations, have common ownership and control and have had a history of collective bargaining with the Union on behalf of the three categories of employees described above. There is no dispute that the Respondents were members of the Association at the time that the 1997–2002 contract was in effect.[3]

Resort is located in Far Rockaway, New York, and Kingsbridge is located in the Bronx, New York.

The evidence shows that during 2000 the Respondents no longer wanted to have the Association represent them for purposes of handling grievances, arbitrations and other matters. Accordingly, in the summer of 2000, the Respondents retained Joel Cohen as their attorney. It appears that the first matter that he was directly involved with was a card count situation where the Union asked that it be given bargaining rights for a group of unrepresented employees at Kingsbridge who apparently signed union authorization cards. That card count occurred on August 16, 2000.

On August 30, 2000, the Association, by its director, Bartholomew J. Lawson, filed a grievance against the Union on behalf of Kingsbridge alleging certain disruptive and abusive behavior by union officials. On September 1, 2000, Kingsbridge, by its counsel, Cohen, filed an unfair labor practice charge against the Union.

By letter faxed September 7, 2000, and copied to Lawson, Union Counsel Irwin Bluestein, and Owner Helen Seiger, Cohen advised Martin F. Scheinman, the permanent arbitrator, that:

> We represent Kingsbridge . . . in all labor matters. All communication regarding Kingsbridge should be through me. The August 30, 2000 letter from Lawson of the . . . Association . . . was sent without my knowledge and without Kingsbridge's authorization. For your information, the matters encompassed by Mr. Lawson's August 30, 2000 letter and Mr. Bluestein's September 6, 2000 letter are before the NLRB pursuant to an unfair labor practice charge filed by Kingsbridge against 1199 on August 31, 2000.

In response, Robin C. Rosen, an attorney representing the Association, faxed a letter to Scheinman objecting to Cohen's letter and stating that the Association was authorized to represent Kingsbridge with respect to the August 30 grievance.

[1] The General Counsel's unopposed motion top correct the transcript is granted.

[2] The Association provides a range of services to its members, only one of which is collective bargaining. Among the other services are: mock survey preparations, representation on matters before the Department of Health, educational seminars, OSHA education and compliance reviews, general legal services, implementation for Medicare and Medicaid services, and market research. In connection with labor relations, the Association provides legal counsel to handle grievances and arbitrations.

[3] Schedule A of the 1997–2002 contract between the Union and the Association lists the employers who had agreed to be bound by multi-employer bargaining and presumably were also members of the Association. There were 28 such employers on this list, including the Respondents.

On September 8, 2000, Cohen sent off another letter to Scheinman, objecting to Rosen's September 7 letter. And without going into the details, I note that Cohen stated:

> Obviously, Kingsbridge will have to consider its options in regard to Ms. Rosen and the Association.

On September 8, 2000, Union Attorney Bluestein wrote to the arbitrator advising that the grievance should be arbitrated and that the unfair labor practice involving the same allegations should be deferred. He stated that as far as the Union was concerned he was ready to proceed to an expedited hearing.

With respect to the various grievances and arbitrations that were generated in 2000 and 2001 between the Respondents and the Union, they were all handled by Cohen without the participation of the Association's counsel. In this regard, Bluestein testified that this is not so unusual in that from time to time various employers, who nevertheless are members of the Association, have chosen to retain their own attorneys to represent them in grievance/arbitration matters. That being the case, Bluestein asserts that this is not inconsistent with those employers continuing to be members of the Association or agreeing to be bound by multiemployer bargaining.

According to company witnesses, Helen Sieger, Solomon Rutenberg, and Joel Cohen, they had conversations with various persons connected with the Union stating that the Respondents no longer were going to be represented by the Association. However, the Union's witnesses disputed the contents of these *oral* communications. Moreover, there is no dispute about the fact that neither of the Respondents sent any type of written communications to the Union or to the Association prior to the commencement of negotiations that they were withdrawing their authorizations to have the Association bargain on their behalf.

The evidence shows that starting in the spring of 2001, the Respondents ceased making membership dues payments to the Association.

On September 7, 2001, the Association, by Denise Baum, its fiscal coordinator, sent a letter to Helen Sieger demanding all current dues and arrears. This letter stated, "If we do not receive payment from you by the 21st of September all services will be suspended."

On December 13, 2001, the Association sent letters to Kingsbridge and Resort indicating that Resort was 6 months in arrears and that Kingsbridge was 7 months in arrears. The letters go on to state that Baum had instructed the Association's staff to suspend all services to the two companies.

On January 13 and 15, 2002, the Association sent letters to Kingsbridge and Resort requesting payment of back dues.

Meanwhile, at some point, probably after September 11, 2001, the Union, and presumably various people associated with this and other multiemployer associations, decided that it would be a good idea to commence early bargaining. (A major contract with the League of Voluntary Hospitals was set to expire in October 2001 so this did not require an early start of negotiations for that group.) As explained by Bluestein, the reason was that with the twin towers attack State money might be diverted to other purposes and inasmuch as much or most of the money derived especially by nursing homes comes from State funding, via Medicaid, it would be a good idea to finalize collective-bargaining agreements (together with discussions with State officials), so that the Union and the employers would be able to go to the State legislature to lobby, ahead of other supplicants, for allocations from the upcoming State budget.

The evidence shows that the Union set up a meeting for a negotiating committee to be held on January 7, 2002. In this regard, Union Organizer Edna Bradshaw sent a letter dated January 3, 2002, to Owner Helen Seiger asking Resort to allow employee Catherine Houston, identified as a member of the negotiating committee, to be released with pay, to attend a union meeting on January 7. On January 9, 2002, the Association, by Bart Lawson, sent a letter to Jay Sackman, the Union's executive vice president, stating inter alia;

> This will confirm the intent of the Association . . . to enter into an extension of the current collective bargaining agreements . . . between GNY and . . . 1199 . . . for the period up through April 30, 2003 on the following economic terms.

It is noted that this memorandum memorializes agreements on substantial terms and conditions for a new contract to replace the existing contract, including the specific wage rates that ultimately were contained in the final memorandum of understanding that was executed on February 1, 2002. Thus, although not a complete agreement and although some of the terms set forth in this January 9 memorandum were later changed, the fact is that this January 9 document indicates that what some might call "discussions" and others might call "negotiations" began at some time *before* January 9.

Union Organizer Edna Bradshaw testified that on the evening of Monday, January 21, 2002 (slightly more than 24 hours before the official start of negotiations), she posted a notice on the union bulletin board in the dining room at Resort that read:

1199 SEIU
Attention all members
Greater New York
Contract negotiations will start at 9:00 AM
At the Sheraton Hotel
January 23, 2002.

Sometime on or about January 22, 2002, Union Organizer Arnette Cunningham spoke with Solomon Rutenberg at Kingsbridge and asked that a couple of employees be released, with pay, to attend the negotiation session that was to be held on January 23, 2002.

On January 23, 2002, the Union and the Association met. The evidence indicates that apart from Lawson no other representatives from the various employers attended or participated in this meeting.

On January 25, 2002, Union Organizers Annette Cunningham and Edna Bradshaw faxed letters, respectively to Ken Gordon, administrator of Kingsbridge and Helen Seiger, administrator of Resort, requesting that certain employees, described as being on the negotiation team, be given leave with pay to attend a meeting on February 1, 2002. The letter to Kingsbridge states that the "Union is scheduled to meet for the Greater New York Nursing Home negotiations."

On January 30, 2002, Sackman faxed a letter to Helen Sieger at Kingsbridge and stated:

> We have scheduled collective bargaining negotiations for Friday, February 1, 2002, at 9:00 a.m. at the Sheraton New York Hotel . . . with the Greater New York Health Care Facilities Association. We anticipate negotiating with

representatives of other proprietary nursing home employers shortly.

In view of recent, fast moving developments on the legislative and collective bargaining fronts in healthcare in New York, it is in the interest of the Union and the industry to conclude collective-bargaining negotiations with all employers as quickly as possible. In order to facilitate this process, we request that the two Union's negotiating committee members from your facility be released to participate in the negotiations scheduled for tomorrow.

On January 31, 2002, Solomon Rutenberg, assistant administrator of Kingsbridge faxed a letter to Sackman stating:

> I am in receipt of your faxed letter dated January 30, 2002 regarding collective bargaining negotiations scheduled for tomorrow, February 1, 2002 at 9:00 AM.
>
> Please be advised that at this time Greater New York has discontinued servicing our facility, and as such, will not be negotiating on our behalf. At this time, I am unable to discuss this matter with Mrs. Sieger for clarification, nor can I clear my schedule for tomorrow.
>
> In the future, when scheduling any meetings, please advise me with ample notice so that I can clear my schedule if needed. In addition, I cannot understand the urgency, as the current contract expires September 30, 2002.

On February 1, 2002, the Union and the Lawson on behalf of the Association entered into a memorandum of agreement. Schedule A of the document purports to list the members of the Association and included Kingsbridge and Resort.

On February 11, 2002, Jack Meisels, the assistant administrator of Resort wrote to Jay Sackman as follows:

> I am certain that you are aware of the fact that the . . . Association has discontinued all services for Resort. I would therefore like to remind you that the [Association] will no longer be negotiating any collective bargaining agreements on our behalf.

On February 15, 2002, Neil Heyman, acting as president of a group called the Southern New York Association Inc., wrote a letter to Sackman asserting that a group of employers whose employees are represented by 1199 had formed this organization for the purpose of negotiating a collective-bargaining agreement. Included in the list was Kingsbridge and Resort.

By letter dated February 20, 2002, Sackman responded to Heyman and stated that the Union would not negotiate with his group until it is clear whom it represented. Sackman also went on to state that the Union would not bargain for any employer who is a member of the Greater New York Health Care Facilities Association and which it considers to be bound by the February 1 memorandum of agreement.

Also on February 20, 2002, Sackman wrote to Sieger and stated inter alia;

> It is the Union's position that Resort and Kingsbridge . . . are bound by the Memorandum of Agreement recently entered into between the Union and the [Association] and that any purported withdrawal from the multi-employer bargaining group represented by the Association is untimely and ineffective so far as the Memorandum of Agreement is concerned.

On April 12, 2002, Cohen sent a letter to Bluestein in which he stated:

> Kingsbridge . . . and Resort . . . wish to negotiate their own collective- bargaining agreement with 1100 as expeditiously as possible. Both . . . are committed to agreeing to the basic economic terms set forth in the recent agreement between 1199 and the . . . Association.

On April 17, 2002, Daniel Ratner, an attorney for the Union responded to Cohen's letter and stated inter alia;

> On January 30, 2002 . . . 1199 . . . and the . . . Association . . . entered into a Memorandum of Agreement to extend the 1997–2002 collective bargaining agreement . . . through April 30, 2005.
>
> As Resort and Kingsbridge are bound by the 2002–2005 GNY CBA, we expect, and demand, that they comply with all terms and conditions of that agreement, including the implementation of the May 1st wage increase.

It is noted that although the new contract states that it is subject to ratification by the Union's members *and* the Association's members, no such ratification procedure was undertaken by the Association. In this regard, the evidence was that although this language has appeared in preceding contracts, the Association has never conducted a ratification process and that new contracts have uniformly been executed by the Association and adopted by its members without a ratification process involving the employers.

It is also noted that prior to the commencement of negotiations, neither the Union nor the Association gave the notices required by Section 8(d) of the Act. These are notices that are required to be given 60 and 30 days prior to a contract's expiration, by the party seeking to terminate or modify an existing contract. But the failure to give such notices is not fatal to making of a new contract. If both parties consent, an existing contract may be terminated or modified in the absence of such notices. In this case, the parties would be the Union and the Association and assuming that the Respondents had not effectively withdrawn their authorizations for the Association to represent them, then the Association's consent to waive the 8(d) notices would be enough and would be binding on the Respondents. Of course, the opposite would also be true. That is, if the Respondents had effectively withdrawn their authorization for multiemployer bargaining, then their consent would not be given and they could insist that the Union live up to the terms of the contract that was not to expire until September 30, 2002.

To summarize, the salient facts are as follows

1. The two Respondents had been members of the Association and had agreed to be bound by multiemployer bargaining between the Association and the Union.

2. In 2001, the Respondents became dissatisfied with Association's representation and hired their own counsel to represent them with respect to grievances, arbitrations, and other legal matters. And although the Respondents ceased making dues payments, neither of the Respondents nor their counsel ever explicitly expressed, in writing, until January 31 and February 11, 2002, that they had withdrawn their authorizations to have the Association represent them for the purpose of negotiating a collective-bargaining agreement.

3. The Union and the Association's president, Lawson, commenced bargaining before January 9, 2002. Neither the

Union nor the Association gave any notice of this bargaining to the Association's members or to any companies that had previously authorized the Association to bargain on their behalf.

4. The Union and the Association described the official start of negotiations as commencing on January 23, 2002. But by that time, the bargaining representatives had already negotiated the outline and most of the details of what would become the new collective-bargaining agreement. This took place at least ten months before the existing contract expired.

5. Despite the assertion that the Respondents "knew" about the early start of the negotiations, the documents and other evidence offered do not show that they were aware of this at any reasonable time before negotiations started. At best, the evidence established that no more than 24 hours before the start of the "official" negotiations (and at least several weeks after the actual start of bargaining), one union agent asked a company administrator to release some employees to attend a bargaining session and that another union agent posted a notice on a union bulletin board.

6. The Respondents gave written notice to the Union that they no longer intended to have the Association bargain on their behalf on January 30 and February 11, 2002. Such written notices were therefore given about 10 months before the expiration of the collective-bargaining agreements to which they had been bound.

III. ANALYSIS

It is axiomatic that a multiemployer bargaining unit cannot be created ab initio by the Board. That is, it is not possible for a union, which is organizing employees of multiple employers within a defined locality, to petition the Board to hold an election in a unit comprising a specified category of employees of any more than one employer. By the same token, an employer may not contend before the Board, in an initial representation case, that the unit sought by a union is inappropriate because a larger unit consisting of similar categories of employees from multiple employers is the smallest appropriate unit.[4]

Multiemployer bargaining units can come into existence only after initial bargaining relationships have been formed between a union and each of many employers. But the existence of a multiemployer bargaining unit can exist only by virtue of the *mutual consent* of the union involved and each separate employer that agrees to be bound by group bargaining. Further, this exception to the rule that bargaining units are to be established on an individual employer basis, requires the consent of each employer and this can be withdrawn by each employer and/or the union, at any time except one.

It should be noted that although multiemployer bargaining units generally take the form of membership associations, this is not a sine qua non for such a unit. It is not critical that there be a formal organization to which individual employers belong or pay dues. Whether an employer is or is not a member of an association is not controlling. What is controlling is whether the individual employers have each manifested unequivocally an intention to be bound by group bargaining rather than by individual action. *Kroger Co.*, 148 NLRB 569 (1964). *Greenhoot, Inc.*, 205 NLRB 250 (1973); *Rock Springs Retail Merchants Assn.*, 188 NLRB 261 (1971); and *Van Eerden Co.*, 154 NLRB 496 (1965). Cf. *New York Typographical Union No. 6 (Royal Composing* Room), 242 NLRB 378 (1979); *Ruan Transport Corp.*, 234 NLRB 241 (1978).

In *Retail Associates, Inc.*, 120 NLRB 388, 395 (1958), the Board made a set of rules regarding multiemployer bargaining and the circumstances under which an employer may withdraw from group bargaining. The Board stated, inter alia:

> We would accordingly refuse to permit the withdrawal of an employer or a union from a duly established multiemployer bargaining unit, except upon adequate written notice given prior to the date set by the contract for modification, or to the agreed-upon date to begin the multiemployer negotiations. Where actual bargaining negotiations based on the existing multiemployer unit have begun, we would not permit, accept on mutual consent, an abandonment of the unit upon which each side has committed itself to the other, absent unusual circumstances.

The rationale of *Retail Clerks* is that of "fostering and maintaining stability in bargaining relationships," by not allowing employers who do not like the way negotiations seem to be going to opt out of the negotiations and insist on separate negotiations after they have committed themselves to bargaining on a multiemployer basis. This rationale applies equally to a union and should preclude a union from attempting to divide and conquer. That is, a union which starts bargaining on a multiemployer basis should, absent consent of the association as a whole, be precluded from dealing directly and separately with the Association's members and attempting to reach separate contracts. Further, the requirement that a withdrawal be accomplished only by a written notice was designed to create certainty and remove subjective criteria which could require the need to make future credibility findings.

In *Charles D. Bonanno Linen Service v. NLRB*, 454 U.S. 404, 410–411 (1982), the Supreme Court noted that the Retail Associates rules "permit any party to withdraw prior to the date set for negotiation of a new contract or the date on which negotiations actually begin, provided that adequate notice is given. Once negotiations for a new contract have commenced, however, withdrawal is permitted only if there is 'mutual consent' or 'unusual circumstances."' The "unusual circumstances" exception has historically been limited to only the most extreme situations, such as where the employer is subject to extreme financial pressures or where the multiemployer unit has dissipated to the point where the unit is no longer a viable bargaining entity. Id. at 410–411.

In *Hi-Way Billboards*, 206 NLRB 22 (1973), enf. denied 500 F.2d 181 (5th Cir. 1974), the Board held that an employer may withdraw from multiemployer bargaining even after negotiations have begun in the following circumstances. For example, the Board has held that an employer may withdraw from group negotiations after they have begun where (1) the employer is subject to extreme economic difficulties resulting in an arrangement under the bankruptcy laws. *U.S. Lingerie Corp.*, 170 NLRB 750 (1968); (2) where the employer is faced with the imminent prospect of closing, *Spun-Jee Corp.*, 171 NLRB 557 (1968); and (3) where the employer is faced with the prospect of being forced out of business for lack of qualified employees and the union refuses to assist the employer by providing employees. *Atlas Electrical Service Co.*, 176 NLRB 827 (1969). However, an assertion of dire economic circumstances will not justify withdrawal from the unit after an agreement is reached.

[4] For a general discussion of multiemployer bargaining see ch. 11, sec. D of the Developing Labor Law).

Co-Ed Garment Co., 231 NLRB 848 (1977); *Arco Electrical Co. v. NLRB*, 618 F.2d 698 (10th Cir. 1980).

On the other hand, unusual circumstances were not found when (1) an employer asserted a good-faith doubt of the union's majority status among his own employees. *Sheridan Creations, Inc.*, 148 NLRB 1503 (1964), enfd. 357 F.2d 245 (2d Cir. 1966); (2) where all the employer's unit employees were discharged. *John J. Corbett Press, Inc.*, 163 NLRB 154 (1967), enfd. 401 F.2d 673 (2d Cir. 1968); (3) where the union executed separate individual contracts with individual employer-members of the association. *We Painters, Inc.*, 176 NLRB 964 (1969); (4) where the employer had been suspended from the association for its failure to pay dues. *Senco, Inc.*, 177 NLRB 882 (1969); (5) where the employer was subjected to a strike. *State Electrical Service*, 198 NLRB 593 (1972), enfd. 477 F.2d 749 (5th Cir. 1973); and (6) where the employer suffered a sharp decline in its business. *Serv-All Co.*, 199 NLRB 1131 (1972), enfd. denied on other grounds 491 F.2d 1273 (10th Cir. 1974)..

Thus, a multiemployer bargaining unit is an exception to the normal single-employer unit. Once established, however, authorization by an employer to the group can be withdrawn at any time, with the exception that it can't be done after the commencement of negotiations for a new agreement. There is, not surprisingly, an exception to the exception, which is that even an untimely withdrawal can be effective in "unusual circumstances."

The issue here is whether the commencement of negotiations to replace an existing contract with about 10 months to run, and absent some kind of notice to individual employers that bargaining was about to start, constitutes unusual circumstances, justifying the withdrawal from multiemployer bargaining after the start of the negotiations.

The General Counsel and the Charging party rely on *Chef La Cort*, 315 NLRB 1036 (1994), and argue that no matter how "prematurely" negotiations begin, an employer that previously authorized an association to represent it in contract negotiations, cannot withdraw from a multiemployer unit, unless it has given prior written notice before the start of the new negotiations. The General Counsel argues that it is irrelevant, as a matter of law, that the employer was unaware that new negotiations were going to commence.[5]

In *Chef La Cort*, an employer after recognizing the union joined an association and authorized it to bargain on its behalf. The most recent contract prior to the events giving rise to the litigation was an association wide contract effective from June 1, 1998, until May 31, 1991. On December 10, 1990 (a bit less than 6 months before expiration), the union sent a letter to the association stating that that it wanted to modify the existing agreement and asked for a meeting in early January 1991. Thereafter, the association and the union agreed to meet on January 7, 1991, and the associations' board of directors was notified of the meeting. About 25 to 30 association members informally heard about this meeting. The January 7 meeting was "private" and was kept secret from the members. It therefore appears that *Chef La Cort*, and other employer/members of the association were not aware of the January 7 meeting. At the January 7 meeting, the union presented its contract demands and therefore, this started the negotiations. Nevertheless, in newsletters to its members dated January 14 and February 4 and 9, the association notified its members that meetings would be held to "discuss the upcoming contract negotiations." On February 19 or 20, the employer wrote to the association and the union stating that it was rescinding the associations' authorization to bargain on its behalf. At this time, the employer was unaware that negotiations had actually begun. Thereafter, the employer filed an RM petition wherein it sought to have an election based on its assertion that it had a reasonable basis for doubting the union's continuing majority status. The Regional Director dismissed the petition, holding that the employer had not timely withdrawn from the multiemployer association and therefore the bargaining unit consisted of the combined group of employees.

In a 3-2 decision, the Board rejected the employer's contention that because the association and union commenced negotiations in secret and unbeknownst to it, this constituted "unusual circumstances" that permitted it to withdraw from multiemployer bargaining even after negotiations had started. The majority opinion states, in pertinent part (id. at 1036, 1037):

> In agreement with the Union and most of the amici curiae who participated . . . we find that no modification to the 36-year old *Retail Associates* rules is necessary or warranted to address the issues raised by this case. We further find that the Acting Regional Director properly applied those rules to the facts here in finding that the Employer had failed to show any "unusual circumstances" within the meaning of *Retail Associates* justifying its otherwise untimely withdrawal. The "unusual circumstances" exception under *Retail Associates* has historically been limited to only the most extreme situations, such as where the withdrawing employer can establish that it is faced with dire economic circumstances, such as imminent bankruptcy, or when the multiemployer unit has dissipated to the point where the unit is no longer a viable bargaining entity. Neither the Employer, nor our dissenting colleagues, cite any precedent which would support extending the "unusual circumstances" exception to situations where the multiemployer association fails, either deliberately or otherwise, to inform its employer-members of the start of negotiations.
>
> Nor do we think that the "unusual circumstances" exception should be extended to such situation . . . Were we to find "unusual circumstances" in cases of this kind where the multiemployer association fails to notify its members of the start of negotiations, we would effectively be imposing a notice requirement on the multiemployer association and inserting ourselves into the association/member relationship unnecessarily and with uncertain consequences.
>
> Finally, while we share the concern expressed in Member Cohen's dissent for the rights of employees, we do not agree that imposing a notice requirement on the multiemployer association would provide the employees of the individual employer-member with any greater protection.

The majority opinion does not answer some questions that were put off to another day. Thus, at footnote 5, the majority states (contrary to Member Cohen's statement) that there is no

[5] The Union also cites non-Board cases such as *Road Sprinkler Fitters Local Union No. 669 v. Simplex Grinnel LP*, 2003 U.S. Dist. Lexis 4215, (W.D.N.Y. 2003); and *Sunrise Undergarment*, 419 F. Supp (S.D.N.Y. 1976).

evidence of collusion or conspiracy involving the union and that if there were such evidence that might or might not be sufficient to show "unusual circumstances."

Member Cohen with whom Member Stephens joined in dissent, stated (id. at 1038):

> [W]here the onset of bargaining was intentionally withheld from the Employer and the Employer would not otherwise have known that bargaining would begin in early January, I view the February withdrawal as privileged under the "unusual circumstances" exception in *Retail Associates.* The Act guarantees employees the right to choose, in an appropriate unit, whether they wish to be represented by a union. The appropriate unit is multiemployer wide only if the employer of the employees has clearly consented to be part of such a unit. In the instant case, the Employer has chosen precisely the opposite, i.e., it has chosen to be in a separate unit. But for the deception practiced by the Association, that decision would have been effectuated prior to the onset of negotiations
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> My colleagues suggest that I am imposing a "notice" requirement in all cases, i.e., a requirement that an association notify its members of any and all negotiations with the union. I am not imposing any such requirement. My decision is based on the narrow facts of this case. Those facts show, through the testimony of the executive director of the Association, that the Association deliberately kept members in the dark with respect to the holding of early negotiations.
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> With respect to employee rights, my colleagues say that "whether an employer bargains individually or as part of a multiemployer unit has no direct impact on employees' Section 7 rights." I disagree. The unit determination in this case has a direct impact on whether the Employer's employees will be able to decide for themselves either they wish to be represented by a union.

In *D. A. Nolt, Inc.*, JD–56–02, Administrative Law Judge Margeret Kern distinguished the facts from those in *Chef La Cort* and concluded that the respondent was not bound by the association wide contract where the union and the association opened and concluded, in secret, negotiations more than 6 months before the contract expired and before the respondent was aware or had any reason to be aware of bargaining.

The present case presents a situation where negotiations between the Union and the Association began well in advance of the contract's termination date, 10 months in advance. And because the negotiations commenced so far in advance of the existing contract's termination date, it should be viewed as unreasonable, unless specific notice was given to the individual employer/members, for them to expect that contract negotiations would begin at this early date.

To the extent that the Union asserts that the Respondents "knew" in advance, of the negotiations, the evidence of this knowledge is not based on any particular act of notification, either by the Union or the Association, but is based on the kind of circumstantial evidence that can be unreliable and subject to credibility findings. Moreover, to the extent that there is evidence that these employers knew of the start of negotiations, this knowledge would have been obtained at best, somewhere around 24 hours before the public negotiations started. To my mind, this is no way to make a rule that would be binding and easily enforceable on other unions and employers in future circumstances.

Section 8(d) of the Act requires any party seeking to modify or terminate a collective-bargaining agreement, to maintain the contract in effect, and to give 60 days' notice to the other party and 30 days' notice to the Federal Mediation and Conciliation Service and any State or Territorial agency established to mediate and conciliate disputes. Obviously, the purpose of this rule is to give the other party sufficient notice that his or her opposite is intent on negotiating contract changes.

Similarly, the Board's contract-bar rules set up a time period of 90 to 60 days prior to an existing contract's expiration date whereby another union, the employees, or the employer may challenge an incumbent's continuing right to represent the employees in the bargaining unit and provides for an election mechanism to resolve that kind of question concerning representation. *Deluxe Metal Furniture Co.*, 121 NLRB 995 (1958). But these same rules provide for an insulation period during which the Board will not entertain a petition from a competing group because it is felt that an incumbent union should be given an unfettered period during which it can bargain without having to deal with representation claims by rivals or groups of employees seeking its ouster. Thus, in contract-bar cases, an incumbent union is given a period of 60 days prior to the contract's expiration date to engage in bargaining free from outside influence. As noted by the Board in *Deluxe Metal*, supra, the insulated period rule will remove "overhanging rivalry and uncertainty during the bargaining period, and will eliminate the possibility for current employees to wait and see how bargaining is proceeding and use another union as a threat to force their representative into unreasonable demands." If no agreement is reached within that 60-day insulated period, then all bets are off, and for example, a rival union can file and have its representation petition processed.

Thus, both Section 8(d) and the Board's contact-bar rules establish a 60-day period immediately prior to a contract's expiration date when a union, which gives proper notice, will be entitled to an insulated period during which it can engage in bargaining with an employer, without outside distraction. The contract-bar rules, creating this 60-day insulated period do mitigate against the ability of employees to select a representative of their own choosing, but it is believed that this limited restriction on employees' rights is more than offset by giving an incumbent union (which after all has a presumption of employee majority support), a greater ability to negotiate and reach a new contract with an employer.

In a multiemployer unit situation, it is my opinion that the Board could require a union to give written notice to the members of an association (or if it chose, to rely on such notification by the Association to its own members), of the intention to commence negotiations by a date certain and thereby preclude any individual employer from withdrawing from association bargaining once it has received, but failed within a reasonable time, to withdraw its authorization for group negotiations. Such a requirement would not impose much of a burden on the parties, who already are required by Section 8(d) to give notices. Alternatively, the Board could fashion a rule which would allow an individual employer to withdraw from a multiemployer bargaining unit at any time before 60 days' prior to the expiration of a contract or unless it has otherwise been given reason-

able advance notice of the commencement of contract negotiations. But that is not the current law.

Despite the Respondents' assertion that the Union and the Association colluded to keep their negotiations a secret, I don't think that the evidence in this case would warrant that conclusion. It is true that during a period before January 9, 2002, the Union and the Association's president, Lawson, did engage in discussions involving the terms of a new contract and did agree on the outline of a new contract. Moreover, there is little doubt that he did so without advising the Association's members of what was going on. But after January 9, Lawson did contact at least some of the employers and, in my opinion, there is no evidence of a deliberate effort by him, in collusion with the Union, to hide the public negotiations that were to start on January 23, 2002.

Therefore, as the Respondents' attempt to withdraw was legally insufficient and as the Union and the Association reached an agreement, the Respondents are legally obligated to execute and abide by its terms. *Acme Wire*, 251 NLRB 1567, 1571 (1980). This includes the obligation to make payments to any the contractually benefit funds on behalf of the employees covered by the agreement.

CONCLUSIONS OF LAW

1. By refusing to execute a collective-bargaining agreement that was mutually agreed to between New York's Health & Human Services Union, 1199/SEIU, AFL–CIO and the Greater New York Health Care Facilities Association, the Respondents have violated Section 8(a)(1) and (5) and Section 8(d) of the Act.

2. By failing to abide by the above contract the Respondents have violated Section 8(a)(1) and (5) of the Act.

3. The above violations affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, I find that they must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Inasmuch as I have concluded that the Respondents has violated the Act by refusing to execute the collective-bargaining agreement reached with the Greater New York Health Care Facilities Association, it shall be ordered to execute this agreement forthwith and to abide by its terms and conditions.

It is further recommended that to the extent that the Respondents have failed to comply with the terms of the above described contract that they be ordered to make whole their employees with interest, for any difference in wages and benefits that they have actually received and what they should have received under the terms of the new contract. Also to the extent that the Respondents have not made payments to any benefit funds in the amounts required by the new contract, they should make such funds whole in accordance with the terms of the aforesaid agreement. Moreover, it is recommended that any such fund payments be made with interest to be computed according to the practice set forth in *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

ORDER

The Respondents Resort Nursing Home and Kingsbridge Heights Rehabilitation Care Center, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain collectively with New York's Health & Human Services Union, 1199/SEIU, AFL–CIO by refusing to sign the contract that was agreed to between that Union and Greater New York Health Care Facilities Association on February 1, 2002.

(b) Refusing to abide by the terms and conditions of the aforesaid agreement.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request of the Union, execute the contract that was agreed to between the Union and the Association in accordance with the terms of the remedy section of this opinion.

(b) Pay into the Unions benefit funds on behalf of unit employees, the amount of contributions that were not made in the amount required by the aforesaid collective-bargaining agreement in the manner set forth in the remedy section of this decision.

(c) Make whole any employees for any losses suffered by reason of their unlawful failure to abide by the terms of the aforesaid agreement in the manner set forth in the Remedy section of this decision.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of back pay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facilities in the Bronx and Queens, New York, copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondents' authorized representative, shall be posted by the Respondents immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondents have gone out of business or closed a facility involved in these proceedings, the Respondents shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since February 1, 2002.

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated, Washington, D.C. May 15, 2003

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain collectively with New York's Health & Human Services Union, 1199/SEIU, AFL–CIO by refusing to sign the contract that was agreed to between that Union and Greater New York Health Care Facilities Association on February 1, 2002.

WE WILL NOT refuse to abide by the terms and conditions of the agreement.

WE WILL NOT in any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, on request of the Union, execute the contract that was agreed to between the Union and the Association in accordance with the terms of the remedy section of this decision.

WE WILL pay into the Union's benefit funds on behalf of unit employees the amount of contributions that were not made in the amount required by the collective-bargaining agreement.

WE WILL make whole any employees for any losses suffered by reason of our failure to abide by the terms of the agreement, in the manner set forth in the remedy section of this decision.

RESORT NURSING HOME AND KINGSBRIDGE HEIGHTS
REHABILITATION CARE CENTER